

1 The Honorable John H. Chun  
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8 UNITED STATES DISTRICT COURT  
9 WESTERN DISTRICT OF WASHINGTON  
10 AT SEATTLE

11 FEDERAL TRADE COMMISSION,

12 Plaintiff,

13 v.

14 AMAZON.COM, INC., *et al.*,

15 Defendants.

16 **No. 2:23-cv-0932-JHC**

17 **DEFENDANTS AMAZON.COM,  
18 INC.'S, NEIL LINDSAY'S, RUSSELL  
19 GRANDINETTI'S, AND JAMIL  
20 GHANI'S REQUEST FOR  
21 JUDICIAL NOTICE IN SUPPORT  
22 OF THEIR MOTIONS TO DISMISS  
23 AMENDED COMPLAINT**

Pursuant to Federal Rule of Evidence 201, Defendants Amazon.com, Inc., Neil Lindsay, Russell Grandinetti, and Jamil Ghani respectfully request that the Court take judicial notice of Exhibits 1–13 to the accompanying Declaration of Joseph A. Reiter (“Reiter Declaration”), submitted in connection with the concurrently filed motions to dismiss. Exhibits 1–13 are judicially noticeable for the reasons detailed below, and summarized here:

No.	Title	Bases for Judicial Notice
1	FTC’s Notice of Proposed Rulemaking: Negative Option Rule	Official government statement; Federal Register publication; contents of FTC website; administrative guidance.
2	FTC’s Dot Com Disclosures: How to Make Effective Disclosures in Digital Advertising	Official government statement; contents of FTC website; administrative guidance.
3	FTC Enforcement Policy Statement Regarding Negative Option Marketing	Official government statement; Federal Register publication; contents of FTC website; administrative guidance.
4	FTC Looks to Modernize Its Guidance on Preventing Digital Deception	Official government statement; contents of FTC website; administrative guidance.
5	FTC Tweet Dated July 9, 2012	Official government statement; statement from verified FTC Twitter account.
6	Letter to Acting FTC Secretary April J. Tabor re: Negative Option Rule	Official government statement; letter received and considered by the FTC.
7	FTC Commissioner Phillips’s Dissenting Statement, <i>In the Matter of MoviePass, Inc.</i>	Official government statement; contents of FTC website; public record of administrative decision; administrative guidance.
8	FTC to Hold Virtual Workshop Exploring Digital “Dark Patterns”	Official government statement; contents of FTC website; administrative guidance.
9	FTC Seeks Public Comment on Dark Patterns Topics ahead of Workshop	Official government statement; contents of FTC website; administrative guidance.
10	Bringing Dark Patterns to Light: An FTC Workshop	Official government statement; contents of FTC website; administrative guidance.
11	FTC’s Dark Patterns Workshop Transcript	Official government statement; contents of FTC website; administrative guidance.
12	FTC Commissioner Slaughter’s Dissenting Statement, <i>In the Matter of FTC v. Facebook</i>	Official government statement; contents of FTC website; public record of administrative decision; administrative guidance.
13	FTC Staff Report - Bringing Dark Patterns to Light	Official government statement; contents of FTC website; administrative guidance.

## I. **LEGAL STANDARD**

2 When ruling on a 12(b)(6) motion, a court may look beyond the pleadings to “documents  
3 incorporated into the complaint by reference, and matters of which a court may take judicial  
4 notice.” *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007); *see also Lee v.*  
5 *City of Los Angeles*, 250 F.3d 668, 688–89 (9th Cir. 2001). “Facts proper for judicial notice are  
6 those facts not subject to reasonable dispute and either ‘generally known’ in the community, or  
7 ‘capable of accurate and ready determination’ by reference to sources whose accuracy cannot be  
8 reasonably questioned.” *Rocha v. California*, 2015 WL 5024915, at \*2 (E.D. Cal. Aug. 25,  
9 2015), *aff’d sub nom. Rocha v. California Dep’t of Corr. & Rehab.*, 691 Fed. App’x 433 (9th  
10 Cir. 2017).

## II. REQUEST FOR JUDICIAL NOTICE

12 Defendants respectfully request that the Court take judicial notice of Exhibits 1–13 to the  
13 Reiter Declaration, all of which are judicially noticeable as official statements made on a  
14 government website or through a verified government account. *See Paralyzed Veterans of Am.*  
15 *v. McPherson*, 2008 WL 4183981, \*5 (N.D. Cal. Sept. 8, 2008) (“Information on government  
16 agency websites has often been treated as properly subject to judicial notice”); *In re Santa Fe*  
17 *Nat. Tobacco Co. Mktg. & Sales Pracs. & Prod. Liab. Litig.*, 288 F. Supp. 3d 1087, 1210  
18 (D.N.M. 2017) (taking judicial notice of FTC press releases “because they are available on a  
19 governmental website”); *Christa McAuliffe Intermediate Sch. PTO, Inc. v. de Blasio*, 364 F.  
20 Supp. 3d 253, 263 (S.D.N.Y. 2019), *aff’d*, 788 F. App’x 85 (2d Cir. 2019) (taking judicial notice  
21 of statements “tweeted by the Mayor on his official account”); *see also* Reiter Decl. ¶¶ 3–15.  
22 Additionally, Exhibits 1–13 are judicially noticeable for the following, independently sufficient  
23 reasons:

24        Excerpts from the Federal Register (Exs. 1 and 3). The contents of the Federal Register  
25 “shall be judicially noticed” as a matter of law. *See* 44 U.S.C. § 1507; *see also Bayview Hunters*  
26 *Point Cnty. Advocates v. Metro. Transp. Comm’n*, 366 F.3d 692, 702 n.5 (9th Cir. 2004)  
27 (granting request for judicial notice of a proposed rulemaking published in the Federal Register).

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MOTIONS TO DISMISS AMENDED COMPLAINT  
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1 Accordingly, the Court should take judicial notice of Exhibits 1 and 3, both of which are  
 2 statements that the FTC published in the Federal Register. *See Reiter Decl. Ex. 1* (88 Fed. Reg.  
 3 24716); *id. Ex. 3* (86 Fed. Reg. 60822); *see also Reiter Decl. ¶¶ 3, 5.*

4 Contents of the FTC's Website (Exs. 1–4, 7–13). It is well-settled that the contents of a  
 5 federal agency's website are judicially noticeable. *See generally In re Santa Fe Nat. Tobacco*  
 6 *Co. Mktg. & Sales Pracs. & Prod. Liab. Litig.*, 288 F. Supp. 3d 1087, 1210 (D.N.M. 2017)  
 7 (explaining that FTC documents were “properly judicially noticed” because they were “available  
 8 on a federal agency’s website”); *see also Kochlani v. Gen. Motors LLC*, 2021 WL 8531593, at  
 9 \*2 (C.D. Cal. Sept. 13, 2021) (statements “publicly available” on party’s “own website” were not  
 10 subject to “reasonable dispute” and were thus judicially noticeable). Accordingly, the Court  
 11 should take judicial notice of Exhibits 1–4 and 7–13, the contents of which are publicly available  
 12 on the FTC’s website. *See Reiter Decl. ¶¶ 3–6; 9–15.*

13 Records of Administrative Decisions (Exs. 7, 12). Courts properly notice “records and  
 14 ‘reports of administrative bodies,’” including administrative decisions. *United States v. 14.02*  
 15 *Acres of Land More or Less in Fresno Cnty.*, 547 F.3d 943, 955 (9th Cir. 2008); *see, e.g., POM*  
 16 *Wonderful LLC v. Coca Cola Co.*, 166 F. Supp. 3d 1085, 1100 (C.D. Cal. 2016) (“The Court  
 17 finds that the ALJ’s Initial Decision and the FTC Opinion are admissible both under Federal  
 18 Rule of Evidence 201(b) and Federal Rule of Evidence 803(8)(A)(iii).”) Accordingly, the Court  
 19 should take judicial notice of Exhibits 7 and 12, which contain FTC commissioners’ dissenting  
 20 statements from official agency decisions. *See Reiter Decl. Exs. 7, 12.*

21 Administrative Guidance (Exs. 1–4, 7–13). Courts often judicially notice public  
 22 statements that indicate what “was in the public realm” at the time of the alleged conduct. *Von*  
 23 *Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010). In doing  
 24 so, courts properly recognize that certain documents are relevant “for the fact that [the party]  
 25 made the statements [the documents] contain[.]” *In re Google Assistant Privacy Litig.*, 457 F.  
 26 Supp. 3d 797, 813 (N.D. Cal. 2020). This is true of Exhibits 1–4 and 7–13, all of which contain  
 27 the FTC’s public guidance regarding the statutes at issue in this case. *See Reiter Decl. Exs. 1–4,*

1 7–13. Such guidance need not be true in order to be relevant; what matters is that they reflect  
 2 what was available to a “regulated party acting in good faith” at the time of the alleged conduct.  
 3 *General Elec. Co. v. EPA*, 53 F.3d 1324, 1328–29 (D.C. Cir. 1995). Accordingly, the Court  
 4 should take judicial notice of Exhibits 1–4 and 7–13.

5        Letter Received and Considered by the FTC (Ex. 6). Courts may “take judicial notice of  
 6 matters of a general public nature,” including documents submitted to federal agencies. *See*  
 7 *generally Vasser v. McDonald*, 228 F. Supp. 3d 1, 10–11 (D.D.C. 2016) (“courts have taken  
 8 judicial notice of . . . parties’ administrative complaints”). Accordingly, the Court should take  
 9 judicial notice of Exhibit 6, which was submitted to the FTC as part of its rulemaking process,  
 10 and subsequently discussed in and cited by the FTC in its notice of proposed rulemaking.

11        *Compare* Reiter Decl. Ex. 6 *with id.* Ex. 1 at 24719 n.34, 24720–21, 24723–29.

12        FTC Statement on Twitter (Ex. 5). “[C]ourts have taken judicial notice of tweets because  
 13 ‘the existence of the publicly-available articles and tweets cannot reasonably be questioned.’”  
 14 *Napear v. Bonneville Int’l Corp.*, 2023 WL 3025258, at \*5 (E.D. Cal. Apr. 20, 2023) (citing  
 15 *Unsworth v. Musk*, 2019 WL 5550060, at \*4 (N.D. Cal. Oct. 28, 2019)); *Nat’l Rifle Ass’n of Am.*  
 16 *v. City of Los Angeles*, 441 F. Supp. 3d 915, 933–34 n.6 (C.D. Cal. 2019) (“The Court therefore  
 17 takes judicial notice of O’Farrell’s statements via his verified Twitter account.”). In this way,  
 18 courts treat the publication of tweets much like the publication of news articles, which have long  
 19 been judicially noticeable. *See, e.g., Napear*, 2023 WL 3025258, at \*5. (taking judicial notice of  
 20 “two news articles and compilation of tweets” as “an indication of what information was in the  
 21 public realm at the time” (citation omitted)). Accordingly, the Court should therefore take  
 22 judicial notice of Exhibit 5, which contains a tweet from the FTC’s verified Twitter account.

23 Reiter Decl. ¶ 7; *id.* Ex. 5.

### III. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court take judicial notice of Exhibits 1–13 to the Reiter Declaration.

DATED this 18th day of October, 2023.

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